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In The

Supreme Court of the United States

October Term, 1982

KATHY RIVINIUS and RONALD WEIKUM,

Petitioners,

vs.

STATE OF NORTH DAKOTA,

Respondents.

PETITION FOR A WRIT OF CERTIORARI
to the
SUPREME COURT OF THE STATE OF NORTH DAKOTA

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QUESTIONS PRESENTED

(1) Is North Dakota's Compulsory School Attendance Law, as Applied To Petitioners, An Unconstitutional Violation Of Their Rights To Worship Freely And Direct The Upbringing Of Their Children As Guaranteed By The First and Ninth Amendments To The United States Constitution And/Or Article I, Section 3 Of The North Dakota Constitution?

(2) In The Face Of Free Exercise Of Religion And Parental Rights Challenges To A State's Compulsory School Attendance Regulatory Scheme, Is The State's Compelling Interest In Its Own Selected Processes For Educating, Or Is The Interest That The Child Is Being Educated?

(3) In The Face of Direct Infringement Upon Free Exercise Of Religion And Parental Rights, May A State Effectively Serve Any Compelling Interest In Education By Other Means Than Directly Regulating An Educational Process That Is Integrally And Inseparably Religious?

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KATHY RIVINIUS and RONALD WEIKUM,

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vs.

STATE OF NORTH DAKOTA,

Respondents.

PETITION FOR A WRIT OF CERTIORARI to the SUPREME COURT OF THE STATE OF NORTH DAKOTA

The petitioners, Kathy Rivinius and Ronald Weikum, respectfully pray that a writ of certiorari issue to review the judgment of the Supreme Court of the State of North Dakota made in this proceeding on December 17, 1982.

OPINIONS BELOW

The opinion of the Supreme Court of the State of North Dakota in *State of North Dakota v. Kathy Rivinius and Ronald Weikum,* is as yet unreported, but is printed

in Appendix A, hereto, at App. 1, *infra*. The memorandum decision on appeal of the South Central Judicial District Court is unreported, but is printed in Appendix B hereto, *infra*, at App. 27. The memorandum opinion of the Sioux County Justice Court is unreported, but is printed, *infra*, in Appendix C hereto, at App. 32.

JURISDICTION

The judgment of the Supreme Court of the State of North Dakota was made on December 17, 1982, and this petition for certiorari is timely filed. This Court's jurisdiction is invoked under 28 U. S. C. § 1257(3) in that the validity of a state statute is drawn into question as being, in its application, repugnant to the free exercise of religion and of parental rights as guaranteed by the First and Ninth Amendments to the Constitution.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

The following provisions of the North Dakota Constitution, the United States Constitution, and the North Dakota Century Code are involved in the questions presented:

UNITED STATES CONSTITUTION

U. S. Const. amend. I:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise

thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

U. S. Const. amend. IX:

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

U. S. Const. amend. XIV § 1:

. . . no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

NORTH DAKOTA CONSTITUTION

N. D. Const. art. I, § 3:

The free exercise and enjoyment of religious profession and worship, without discrimination or preference shall be forever guaranteed in this state, and no person shall be rendered incompetent to be a witness or juror on account of his opinion on matters of religious belief; but the liberty of conscience hereby secured shall not be so construed as to excuse acts of licentiousness, or justify practices inconsistent with the peace or safety of this state.

N. D. Const. art. VIII, §§ 1, 2, 3, and 4:

Section 1. A high degree of intelligence, patriotism, integrity and morality on the part of every voter in a government by the people being necessary in order to insure the continuance of that government and the prosperity and happiness of the people, the legislative assembly shall make provision for the establishment and maintenance of a system of public schools which shall be open to all children of the State of North Dakota and free from sectarian con-

trol. This legislative requirement shall be irrevocable without the consent of the United States and the people of North Dakota.

Section 2. The legislative assembly shall provide for a uniform system of free public schools throughout the state, beginning with the primary and extending through all grades up to and including schools of higher education, except that the legislative assembly may authorize tuition, fees and service charges to assist in the financing of public schools of higher education.

Section 3. In all schools instruction shall be given as far as practicable in those branches of knowledge that tend to impress upon the mind the vital importance of truthfulness, temperance, purity, public spirit, and respect for honest labor of every kind.

Section 4. The legislative assembly shall take such other steps as may be necessary to prevent illiteracy, secure a reasonable degree of uniformity in courses of study, and to promote industrial, scientific, and agricultural improvements.

NORTH DAKOTA CENTURY CODE

N. D. Cent. Code § 15-34.1-01:

Every parent, guardian, or other person who resides within any school district, or who resides upon any government base or installation without any school district, and has control over any educable child of an age of seven years to sixteen years who does not fall under the provisions of sections 15-34.1-02-04 or 15-34.1-03, shall send or take such child to a public school each year during the entire time such school is in session.

N. D. Cent. Code § 15-34.1-05:

Any person failing to comply with the requirements of this chapter is guilty of an infraction.

N. D. Cent. Code § 15-34.1-03(1):

> The parent, guardian, or other person having control of a child required to attend school by the provisions of this chapter shall be excused by the school board from causing the child to attend school whenever it shall be shown to the satisfaction of the board, subject to appeal as provided by law, that one of the following reasons exists:
>
> 1. That the child is in attendance for the same length of time at a parochial or private school approved by the county superintendent of schools and the superintendent of public instruction. No such school shall be approved unless the teachers therein are legally certificated in the State of North Dakota in accordance with section 15-41-25 and chapter 15-36, the subjects offered are in accordance with sections 15-38-07, 15-41-06, and 15-41-24, and such school is in compliance with all municipal and state health, fire, and safety laws.

This case also presents questions with regard to teacher certification requirements of Chapter 15-36 and section 15-41-25 of the North Dakota Century Code. The pertinent text of these statutes are set forth verbatim in Appendix D hereto, *infra*, at App. 36.

STATEMENT OF THE CASE

Petitioners Kathy Rivinius and Ronald Weikum were Defendants in a criminal justice action before the Sioux County Justice Court. Both petitioners were charged with violation of N. D. Cent. Code § 15-34.1-01 for sending their children, without excuse from the school board, to Living Word Academy, a Christian day school that is not

approved by the County Superintendent of Schools and the Superintendent of Public Instruction of North Dakota as required by N. D. Cent. Code § 15-34.1-03(1).

A joint trial of petitioners was held before the Court on September 9, 1981. In its memorandum opinion, the Court declared that:

> [i]n response to the state's showing, the defendants assert that the North Dakota Compulsory school attendance law as applied to them, is a constitutionally impermissive burden on their free exercise of religion, contrary to the First Amendment to the United States Constitution. Although the Court is sympathetic to defendants' well-presented case, it finds the defendants guilty. . . . See App. A, *infra*, at App. 1.

Each petitioner was fined $10.00.

The petitioners appealed that judgment in a trial *de novo* before the South Central Judicial District Court, Grant County, North Dakota. The Court, in its Memorandum Decision on Appeal found that

> the evidence establishes violation of 15-34.1-01 by evidence beyond a reasonable doubt. . . . However, Defendants do challenge the constitutionality of 15-34.1-01 claiming that as applied to them it violates their right to the free exercise of religion contrary to the First Amendment of the U. S. Constitution.
>
> • • •
>
> The Court finds Defendants guilty as charged and imposed punishment identical to that imposed in justice court. The Defendants do not intend to be lawbreakers and this case is only a means of asserting their constitutional rights. See App. B, *infra*, at App. 30.

The petitioners appealed that judgment to the North Dakota Supreme Court. In the Brief of Appellants, pe-

titioners raised their constitutional questions in the "Statement of Issues:"

II.

The Trial Court Erred In Failing To Determine That The North Dakota School Laws And Regulations, As Applied To Appellants, Violate Their Right To The Free Exercise Of Religion And To Educate Their Children As Guaranteed By The North Dakota And United States Constitutions.

A. The Trial Court failed to determine that appellants' religious/parental belief that they must educate their children from a Biblical viewpoint without state interference is a sincerely held belief.

B. The Trial Court failed to determine that appellants' parental right to educate their children and their right to free exercise of religion is unduly burdened by the regulations as applied to appellants.

C. The state did not prove that it had an overriding interest in NDCC 25-34.1-03 that cannot be met by a less drastic alternative means.

The North Dakota Supreme Court summarized the religious beliefs of petitioners in its statement of facts of its decision. (See App. A, at App. 1). The Court accepted that the belief of the petitioners that "they are commanded by God to send their children to teachers who have not submitted themselves to the state certification process and to a school which has not submitted to the approval process required by the compulsory education laws" was a sincerely held belief that was religiously based. (See App. A, at App. 1).

In continuing its First Amendment analysis, the Court held that the petitioners had demonstrated that compli-

ance with the compulsory education law was prohibited by their religious beliefs, (App. A, at App. 1), but that the state's interest in education balances those beliefs (App. A, at App. 1), and the suggested alternative to direct regulation, submission of standardized achievement test scores, would not satisfy the state's interest (App. A, at App. 1). It is from this ruling that petitioners pray a writ of certiorari issue.

REASONS FOR GRANTING WRIT

A. The Decision Below Recognized That North Dakota Statutes Infringed Upon Free Exercise Of Religious And Parental Rights Guaranteed By The First Amendment To The U. S. Constitution And By Article I, Section 4 Of The North Dakota Constitution, But That Fact Notwithstanding, Imposed Criminal Sanctions For The Exercise Of That Right.

The affirmance by the North Dakota Supreme Court of the lower courts' convictions of petitioners for attempting to exercise their religious convictions is abhorrent to the very principles for which the religion clauses of the First Amendment were added to the Constitution of the United States. It is also contrary to the principles guaranteed by the North Dakota Constitution's Declaration of Rights. It is perhaps more abhorrent because all three lower courts recognized and respected the petitioners' sincerely held religious beliefs. They each agreed that the conduct for which the petitioners were being penalized was based upon deeply held religious convictions. Albeit reluctantly, they each nevertheless penalized petitioners for exercising those religious convictions.

That the values enshrined in the First Amendment "plainly rank high 'in the scale of our national values' " is a principle well and long-settled. *NLRB v. Catholic Bishop of Chicago,* 440 U. S. 490, 501, 99 S. Ct. 1313, 59 L. Ed. 2d 553, 544 (1979). But "[n]o provision of the Constitution is more closely tied to a given content by its generating history than the religion clause of the First Amendment." *Everson v. Board of Education,* 330 U. S. 1, 33, 67 S. Ct. 504, 91 L. Ed. 711 (1947). No more succinct summary of that history and the impetus surrounding the religious clause can be found than that in the dissenting opinion by four justices to this Court's *Everson* decision.

> For Madison, as also for Jefferson, religious freedom was the crux of the struggle for freedom in general.
>
> • • •
>
> Madison was certain in his own mind that under the Constitution "there is not a shadow of right in the general government to intermeddle with religion" and that "this subject is, for the honor of America, perfectly free and unshackled. The government has no jurisdiction over it." *Id.,* at 34 and 38.

At the date of the *Everson* decision, the dissenting justices found that the only one serious remaining threat "to maintaining that complete and permanent separation of religion and civil power which the First Amendment commands is through the use of the taxing power to support religion, religious establishments, or establishments having a religious foundation whatever their form or special religious function." *Id.,* at 44. According to the dissent, such an exercise was impermissible because

> daily religious education commingled with secular is "religious within the guarantee's comprehensive

> scope." So are religious training and teaching in whatever form. The word connotes the broadest content, determined not by the form or formality of the teaching, but by its essential nature regardless of its details. *Id.*, at 33.

This Court's later decision, *Lemon v. Kurtzman*, 403 U. S. 602, 91 S. Ct. 2105, 29 L. Ed. 2d 745 (1971) affirmed the concepts discussed by the four dissenting justices in *Everson* when it held that the government is to be "entirely excluded from the area of religious instruction." *Lemon, supra*, at 625.

Therefore the amendment, said the *Everson* dissent, secured all forms of religious expression, including religious teaching, except "conduct which trenches upon the freedom of others or clearly and presently endangers the community's good order and security." In its own footnote the dissent explained that the concept of clear and present danger was from Jefferson himself, when he declared in the Virginia Statute for establishing religious freedom: "That it is time enough for the rightful purposes of civil government for its officers to interfere when principles break out into overt acts against peace and good order." This principle has also been affirmed by this Court in its other decision. E. g., *Schneider v. Irvington* 308 U. S. 147, 164, 60 S. Ct. 146, 84 L. Ed. 155 (1939); *Sherbert v. Verner*, 374 U. S. 398, 407-409, 82 S. Ct. 1790, 10 L. Ed. 2d 965 (1963).

This case presents to this Court for its attention a new "serious threat" to the guarantees of the Religious Clauses of the First Amendment, a threat which is in direct contravention to the principles of the United States and North Dakota Constitutions and to the decision of

Wisconsin v. Yoder, 406 U. S. 205, 92 S. Ct. 1526, 32 L. Ed. 2d 15 (1972). The threat in *Everson* was that religion would intrude into matters of state. The threat here is that the state is intruding into matters of religion. While the state is traditionally quick to prohibit intrusion into its powers, it is not so hasty to limit its own interference into matters that the Court has declared is none of its business.

These petitioners need the assistance of this Court. These two petitioners are pleading not only for their own religious liberties against the wealth and the power of the State of North Dakota. The stand they have taken against government intrusion into the religious education of their children is a fight that is being more and more frequently waged in state after state. They have been told by their state, in essence, under threat imposition of criminal sanction, to perform acts admittedly at odds with fundamental tenets of their religious beliefs. The lower court recognizes that the children of these parents are performing admirably in the religious educational system in which they have been enrolled. Therefore, though petitioner's conduct posed no clear and present danger that their child's well-being, or that of society, is in any way threatened, the court insisted upon imposing prior restraints upon petitioners' conduct because it is "an acceptable method of satisfying part of the constitutional mandate to the legislature to properly provide an education for its youth." In a case involving beliefs that are admittedly religious and sincere, merely being "an acceptable method" of accomplishing a state's goals is not enough. There must be no other less drastic alternative method by which those goals may be satisfied.

The protection of a man's religious beliefs is probably the paramount and fundamental obligation of government. While the freedoms of speech and of the press and of assembly are essential to the quality of the temporal life of America's citizens, the freedom from interference into religious right goes not only to that quality, but also to the eternal state of a believer's soul. These petitioners seek to protect the very lifeblood of their religion—their children. Like the parents in *Yoder,* these petitioners seek to educate their children in the doctrines of their faith so that that faith might continue. The Court below says the suggested alternative to direct interference into the religious belief might possibly be too late to prevent the child from wasting a term, a semester, or a year. These parents are convinced that to submit the religious training of their children to the authority the state attempts to assume would demonstrate objectively to the children that the religious beliefs are not sincere. Implicit in the state's requirement is the idea that the children may not understand now, but they will understand in the future what their parents really believed. Petitioners are trying to now teach their children that they must exercise their beliefs by their objective actions. They must live now what they believe. The state's prohibition goes to the very heart of this education. It does not allow the parents to act what they believe.

The Court found in *Yoder* that the laws impacted the religious tenets and *practices* of the Amish faith. The Court determined that the impact of the compulsory attendance law on the *practice* of the Amish religion was severe and inescapable. The impact was evident from both as subjective, and an objective point of view. Forc-

ing them to perform acts undeniably at odds with important religious tenets was a grave interference with those tenets from a subjective point of view. It also carried with it the kind of objective danger that the First Amendment was designed to prevent. Like the Yoders, these petitioners must either abandon their belief and conform to the majoritarian standards of education, continue to practice their faith and face repeated imposition of criminal sanctions, or be forced to migrate to some other and more tolerant region. *Yoder, supra* at 218. The intent of the First Amendment was to prevent the imposition of that set of alternatives. This case is important to carry out that intent.

B. This Decision Is In Conflict With Other State Jurisdictions And With Decisions Of This Court.

This Court recognized in *Yoder* that changes in circumstances and the state of affairs sometimes bring into play new tensions and conflicts between long held religious beliefs and the new circumstances. The Court surveyed the long, and deeply religious history of the Old Order Amish. For nearly three centuries, the Amish had demonstrated, in a very objective manner, that religion "pervades and determines their entire way of life." *Id.*, at 216. Until "great changes in education" came about, the Old Order Amish beliefs were not threatened by the state's requirement that their children be compelled to attend a public school.

> So long as compulsory education laws were confined to eight grades of elementary basic education imparted in a nearby rural schoolhouse, with a large proportion of students of the Amish faith, the Old Order Amish had little basis to fear that school at-

> tendance would expose their children to the worldly influence they reject. But the modern compulsory secondary education in rural areas is now largely carried on in a consolidated school, often remote from the student's home and alien to his daily home life. *Id.*, at 217.

This Court, then, determined that these recent changes in the processes of education did indeed infringe upon the sincerely held Amish beliefs that could be traced back some three hundred years. Despite the fact that the Amish objection to the compulsory attendance requirement beyond the elementary level was a relatively recent objection, it was not because of a recently acquired religious belief, but because of changes in the circumstances surrounding that belief. The Court said that it could

> not be overemphasized that we are not dealing with a way of life and mode of education by a group claiming to have recently discovered some "progressive" or more enlightened process for rearing children for modern life. *Id.*, at 218.

The Yoders, members of the Old Amish faith, simply could not submit to the changes in compulsory attendance law of Wisconsin which had come into conflict with their faith.

The petitioners face similar changes in the field of education which have come into conflict with what the record demonstrated to be a long history of their fundamentalist religious faith. Expert witness, Dr. Rousas Rushdoony, testified at some length that from the days of the Caesars in ancient Rome, the church had been seeking to give their children a religious education without interference by the Caesars.

Recent decisions by this Court which, among other things, prohibited prayer and Bible reading in the public schools, and which, to comply with the establishment clause of the First Amendment, mandated that instruction at public schools be given from a religiously neutral point of view, have raised new tensions with fundamentalist religious believers, such as the petitioners, across the country. The petitioners believe that there can be no education separate from religion. Since that kind of religious education could no longer be obtained through the public school systems, many religious school systems have been established throughout the country. Dr. Raymond Moore, Chief Executive Officer of the Hewitt Research Foundation and consultant to the National Education Association, testified that this church school movement grew some 134 percent in the previous ten to fifteen years and was composed of conservative denominations which considered their religious schools to be a very integral part of their church program. (District Court transcript, pp. 41-42). Thus have been raised the new tensions between faith and state.

> Government regulation of private religious schools has been the center of the most recent set of tremors and earthquakes in the nation's educational system. Using compulsory education, curriculum, and teacher certification requirements, states have sought to regulate and control the education given in nonpublic schools over the religious objections of those concerned. Binder, *Douglas v. Faith Baptist Church Under Constitutional Scrutiny*, 61 Neb. L. Rev. 74, 79 (1982). (Footnotes omitted).

In the case herein, North Dakota seeks to regulate this religious school through the state's teacher certification and school approval processes. However, North Da-

kota Superintendent of Public Instruction, Dr. Joseph Crawford, testified that since certification and approval do not guarantee quality education, the state's interest in education, at least with regard to nonpublic non-tax supported schools, could be met if these parents would submit to the state their child's standardized achievement test results to demonstrate that the child had learned. The North Dakota Supreme Court, Dr. Crawford's testimony notwithstanding, held that the teacher certification and school approval requirements were acceptable methods of assuring the state's interest, and that despite the fact that they conflict with petitioners' religious beliefs, they would be applied to Living Word Academy so that the parents were guilty of violating the compulsory attendance statute.

The state courts which have been presented with issues which are similar to these, have split over their decisions. Some have agreed with Dr. Crawford that the state's interest in education can be served without compliance with state regulations. (E. g., *Kentucky State Board, et al. v. Rudasill*, 589 S. W. 2d 877 (Ky. 1979), *cert. denied*, 446 U. S. 938 (1980); *State v. Whisner*, 47 Ohio St. 2d 181, 351 N. E. 2d 750 (1976); *State v. LaBarge*, 134 Vt. 276, 357 A. 2d 121 (1976); *State v. Massa*, 95 N. J. Super. 382, 231 A. 2d 252 [Morris County Ct. 1967].)

Other courts, such as the case herein, have determined that the state's interest in education may only be served by the state's own selected processes for educating, such as teacher certification and school approval. (See *State v. Riddle*, 285 S. E. 2d 359 (W. Va. 1981); *State v. Shaver*, 294 N. W. 2d 883 (N. D. 1980); *Douglas v. Faith Baptist Church*, 207 Neb. 802, 301 N. W. 2d 571 (1981), *dismissed*, 454 U. S. 803 [1981].)

The decision of *Wisconsin v. Yoder, supra,* has left confusion in the states over just what is the state's interest in education. Is it the process of education? In other words, is the state's interest in instruments which are used to produce learning - textbooks, number of educational days, the facilities, equipment, educational background of teachers? Or is it the state's interest that the child is being educated, is learning what is being taught? The *Yoder* decision accepted the state's claim that its interest lay in preparing "citizens to participate effectively in our open political system" and preparing "individuals to be self-reliant and self-sufficient participants in society." *Yoder,* at 221. The decision did not mandate a process by which those two goals could be accomplished.

The North Dakota Supreme Court quoted at length from the state's constitution as the state's interest that mandates "a high degree of intelligence, patriotism, integrity and morality on the part of every voter (VIII § 1), impressing upon the mind the importance of truthfulness, temperance, purity, public spirit and respect for honest labor (VIII § 3) and the prevention of illiteracy. The state has ably provided for these requirements in its system of free public schools mandated by those constitutional provisions. But that Constitution also recognizes that schools other than the free public schools may reach those same goals when it shifts from the use of "public schools" to the use of "all schools." None of these provisions, however, indicate an interest in the process by which illiteracy is prevented. They all look to an end product—an educated citizen, one who has a high degree of intelligence, patriotism and integrity.

It must be recalled that it is a religious education which is being provided to these children. Living Word

Academy receives no public funds. The State of North Dakota is attempting to regulate this religious education with what might be labeled neutral standards. However, as this Court has determined,

> a regulation neutral on its face may, in its application, nonetheless offend the constitutional requirement for governmental neutrality if it unduly burdens the free exercise of religion. *Yoder, supra,* at 220; *Thomas v. Review Board,* 450 U. S. 707, 717, 101 S. Ct. 1425, 67 L. Ed. 2d 624, 633 (1981).

Any interference by the state into the affairs of this religious education conflicts with the line of decisions from this Court which has denied to the state the power to have any contact with religious schools which are "an integral part of the religious mission" of their sponsors (*Lemon v. Kurtzman,* 403 U. S. 602, 616 [1971]), that mission being "the only reason for the schools' existence" (*Meek v. Pittenger,* 421 U. S. 349, 366 [1975]); whose "affirmative, if not dominant, policy is to assure further adherents to a particular faith by having control of their education at an early age." (*Tilton v. Richardson,* 403 U. S. 672, 685-686 [1971]); whose teachers advance the religious mission of the religious schools which they serve (*Public Funds For Public Schools v. Marburger,* 358 F. Supp. 29, 40-41, *aff'd* 417 U. S. 961 [1974]); whose technical training goes hand in hand with the religious mission," so that, within the religious school, "the two are inextricably intertwined." *Meek, supra,* at 366.

The petitioners demonstrated to the state that their children are learning at Living Word Academy. They are willing to continue to demonstrate that fact to the State of North Dakota. They contend that the state's interest in the education of their children will be met by

this method which is a less drastic infringement upon their rights to freely exercise their religious faith and to educate and raise their own children. They do not wish to move to Kentucky, where those constitutional rights have been protected by allowing parents to demonstrate the state's interest by submitting test results. *Rudasill, supra.* Neither are they ready to immigrate to New Jersey, where a parent, uncertificated by the state, is allowed to give her child an equivalent education as demonstrated by standard achievement test scores, *Massa, supra;* or to Ohio, where the "minimum standards" for the operation of non-public schools have been held to be a violation of the free exercise of religion, *Whisner, supra.* Neither do they want to be considered law breakers for continuing to practice their faith in North Dakota. They cannot, in good conscience before God, recant their religious convictions which dictate that they give their children a religious education free from control by the state.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinions of the Supreme Court of North Dakota.

Respectfully submitted,

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APPENDIX A

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

State of North Dakota,

Plaintiff and Appellee,

vs.

Kathy Rivinius and Ronald Weikum,
Defendants and Appellants.

Criminal No. 862

(Filed December 17, 1982)

Appeal from the District Court of Grant County, the Honorable William F. Hodny, Judge.

AFFIRMED.

Opinion of the Court by Sand, Justice.

Terry A. Adkins, Assistant Attorney General, Bismarck, and James Vukelic, Special Assistant Attorney General, Box 702, Mott, for plaintiff and appellee; argued by Terry Adkins.

Gibbs & Craze, Cleveland, Ohio, and Boutrous [sic] and Halpern, Glen Ullin, for defendants and appellants; argued by David C. Gibbs, Jr.

Criminal No. 862

State v. Rivinius

SAND, Justice.

The defendants and appellants, Kathy Rivinius and Ronald Weikum, were charged with and found guilty of violating the North Dakota compulsory school attendance

law, § 15-34.1-01, North Dakota Century Code,[1] by sending their children to the Living Word Academy, a Christian day school not approved by the County Superintendent of Schools and the Superintendent of Public Instruction of North Dakota. The judgment of conviction was entered and the defendants appealed.

The defendants and their families resided in Grant County, North Dakota, within the Elgin Public School District. The defendant parents had control over their children between 25 August and 30 September 1980. During this time the children were between 7 and 16 years of age, but were not attending the Elgin public school or a private or parochial school approved pursuant to NDCC § 15-34.1-03.[2] Instead, the defendants' children were attending the Living Word Academy, a private school not approved by the County Superintendent of School and the Superintendent of Public Instruction of North Dakota.

The Living Word Academy employs a Bible-based Christian educational program. The defendants believe that the Bible is the inspired Word of God and commands them to raise and educate their children in accordance with its precepts. The defendants' primary contention is that they, and not the state, are mandated by God to provide their children with an education. The defendants contended that the curriculum at the Living Word Academy is an integral and inseparable part of their religious beliefs and practices. The defendants believe that God compels them to provide an education for their children where they may be taught all subjects from a Biblical, God-centered perspective; where they may be taught their correct relationship to God and those in authority over

them; and where they may be taught Christ-like character qualities and personality traits through the instruction and example of teachers who practice those same traits. Accordingly, the defendants contended that they are commanded by God to send their children to teachers who have not submitted themselves to the state teacher certification process and to a school which has not submitted to the approval process of the North Dakota Department of Public Instruction.

Defendant Weikum, responding to questions, testified:

> "Q. Can you relate how it would be violative? Summarize what I think you've already said?
>
> "A. Because of the fact we have the mandate—there is a higher authority than the State, I guess is what it comes down to, and God is that higher authority—and the way God has directed that we go ahead and educate our children, this was, is, according to the Word of God. To allow the State to have a relationship where they could be in between the mandate from the Word of God to the parent would violate my religious freedom in order to be able to do that.
>
> "Q. The other area of concern, the certification of teachers, would it violate your convictional beliefs to have certified teachers teach your children?
>
> "A. Yes; because again of the relationship that the State would want to interpose their requirements in order to determine whether or not we can go ahead and follow a directive that the Word of God sets out. By the State being allowed to do that, that would violate my beliefs."

Defendant Rivinius testified, as pertinent to her belief, in substance as follows:

> "Q. I would like to ask you to state to the Court in your own words; what the difficulty is, why you

have difficulty with this relationship of the State coming in and approving the education, the educational process of your children.

"A. I do believe like Mr. Weikum, that if we had it approved, it would no longer be under the rule of God, but under the rule of the State."[3]

On appeal, the defendants contended, in substance, that the state laws and regulations as applied to them violated their right to the free exercise of religion and to educate their children as guaranteed by the North Dakota and United States Constitutions.[4]

The First Amendment, made applicable to the states through the Fourteenth Amendment in *Cantwell v. Connecticut,* 310 U. S. 296, 60 S. Ct. 900, 84 L. Ed. 1213 (1940), prevents Congress or state legislatures from enacting laws respecting an establishment of religion or prohibiting the free exercise of religion.

Although the freedom to hold religious beliefs is absolute, the freedom to act, even if the action is in accord with religious convictions, is not totally free from legislative restrictions. See, *e.g., Sherbert v. Verner,* 374 U. S. 398, 83 S. Ct. 1790, 10 L. Ed. 2d 965 (1963) [denial of unemployment compensation benefits to Seventh-Day Adventist restricted free exercise of religion and state's interest did not justify restriction]; *Braunfeld v. Brown,* 366 U. S. 599, 81 S. Ct. 1144, 6 L. Ed. 2d 563 (1961) [free exercise of religion not violated by Sunday closing law]; *Prince v. Commonwealth of Massachusetts,* 321 U. S. 158, 64 S. Ct. 438, 88 L. Ed. 645 (1944) [statute prohibiting children under specified age from selling newspapers, magazines, or periodicals in public street did not violate free exercise of religion]; *Cantwell v. Connecticut, supra,* [stat-

ute prohibiting solicitation of money for a religious cause unless cause was approved by secretary of public welfare counsel violated free exercise of religion]; *Reynolds v. United States*, 98 U.S. 145, 25 L.Ed. 244 (1879) [statute prohibiting polygamy did not violate free exercise of religion]; *State v. Shaver*, 294 N.W.2d 883 (N.D. 1980) [compulsory school attendance law did not violate free exercise of religion].

The resolution of a conflict between the free exercise of religious beliefs and the state's interest in the health, safety, and welfare of its citizens requires a delicate balance to accommodate these interests. *Braunfeld v. Brown, supra; Prince v. Commonwealth of Massachusetts, supra; State v. Shaver, supra.*

In *State v. Shaver, supra*, after an examination of United States Supreme Court decisions involving free exercise issues under the First Amendment, we applied the constitutional analysis and approach utilized in *Wisconsin v. Yoder*, 406 U.S. 205, 92 S.Ct. 1526, 32 L.Ed. 2d 15 (1972), and *Sherbert v. Verner, supra*, to resolve a conflict between the state's interest in the education of its youth and the fundamental rights and interests protected by the free exercise clause of the First Amendment and the traditional interest of parents with respect to the religious upbringing of their children. We recognized that the constitutional analysis of cases arising under the free exercise clause are generally tailored to their particular factual situation. The constitutional analysis used in *State v. Shaver, supra* at 891, is as follows:

> ". . . (1) whether or not the activity interfered with by the state is motivated by and rooted in a legitimate and sincerely-held religious belief [citation

> omitted]; (2) whether or not the parties' . . . free exercise of religion had been burdened by the regulation, and the extent or impact on their religious practices [citation omitted]; and (3) whether or not the state had a compelling interest in the regulation which justified the burden on the free exercise of religion and overrode the interest of the . . . parents in exercising their religious practices.

Because of the interrelation of the sincerity of the defendants' belief and the burden on that belief, we will consider these two aspects of the constitutional analysis in conjunction with each other. A consideration of the burden on a religious belief necessarily requires us to consider the sincerity of that belief.[5]

On appeal to this Court, the state contended that the defendants' belief was of extremely short duration and that the testimony offered by the defendants was so inconsistent as to undermine any claim of sincerity as to the belief held by the parents. The state points out that although the defendants objected to compliance with certain state requirements for approval of the Living Word Academy [certified teachers], the defendants do not object to the requirements that the school be in compliance with fire, health, and safety laws; that certain specific subjects be taught; and that courses be taught a minimum number of days during the year. The state also points out that one of the teachers at Living Word Academy was certified in the state of Oklahoma. During oral argument the state conceded that, except for these inconsistencies, the beliefs held by the defendants were sincere religious beliefs.

The defendants responded to the state's contentions of inconsistencies by asserting that as long as there was no conflict between "God's law" and the state's require-

ments, the parents were not adverse to complying with state requirements. The defendants contended that the requirements they did not object to did not affect their belief that they were given the responsibility by the Word of God to educate their children.

As we have observed, the freedom to hold religious beliefs and opinions is absolute; however, actions motivated by those beliefs are not immune from regulation. Only beliefs rooted in religion are protected by the free exercise clause, but religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection. *Thomas v. Review Board of the Indiana Employment Security Division,* 450 U. S. 707, 101 S. Ct. 1425, 67 L. Ed. 2d 624 (1981). It is not within " 'the judicial function and judicial competence; . . . to determine . . . the proper interpretation of the Amish faith;' [c]ourts are not arbiters of scriptural interpretation." *United States v. Lee,* — U. S. —, 102 S. Ct. 1051, 71 L. Ed. 2d 127 (1982), citing *Thomas v. Review Bd. of Indiana Employment Security Division, supra.* This concept of religious liberty necessarily requires the beliefs, as long as they are religious and not secular, may have a wide divergence among individuals and still be entitled to First Amendment protection. See, *United States v. Ballard,* 322 U. S. 78, 64 S. Ct. 882, 88 L. Ed. 1148 (1944); *West Virginia State Board of Education v. Barnette,* 319 U. S. 624, 63 S. Ct. 1178, 87 L. Ed. 1628 (1943). However, showing of a sincerely held religious belief is necessary to prevent a limitless excuse for avoiding all unwanted legal obligations and a group's word cannot automatically be accepted if a religious exemption is at issue. See, *United States v. Kuch,* 288 F. Supp. 439 (D. D. C. 1968), 35 A. L. R.

3d 922 [denying a religious exemption from federal drug regulations where extrinsic evidence established that only a tactical pretense of religion was involved: members of the "Neo-American Church" with its heads known as Boo Hoos, the seal of the church was a three-eyed toad, and the church motto was "Victory over Horseshit."]

In this instance, the beliefs of the defendants are based on their perspective of accepting God's role into their lives as well as into the education of their children. These beliefs do not express a political, philosophical, or moral preference; but instead represent a conviction rooted in their religious beliefs. Without a contrary showing that the defendants' beliefs are based on anything but religion, and considering that individual beliefs may be divergent, we must accept and assume that the individual defendants hold these beliefs as sincere religious beliefs.

Interrelated with the wide latitude afforded a religious belief is the quality and sincerity of the belief and the burden cast upon the belief by the state's laws and regulations. Persons challenging a statute affecting the free exercise of religion must demonstrate the manner in which the state's minimum requirements or standards infringe upon their free exercise of religion. *State v. Shaver, supra.* The quality of the claims concerning the encroachment of the compulsory school attendance laws on the defendants' rights to the free exercise of their religious beliefs is an important consideration. *Wisconsin v. Yoder,* 406 U. S. at 215, 32 L. Ed. 2d at 25.

In *Wisconsin v. Yoder, supra,* the United States Supreme Court carefully evaluated the quality of the Amish claims concerning the encroachment of Wisconsin's compulsory school attendance statute on their religious beliefs

and considered whether or not the Amish religious faith and their mode of life were inseparable and interdependent. The Supreme Court noted that the record supported the Amish claim that the "traditional way of life of the Amish is not merely a matter of personal preference, but one of deep religious conviction, shared by an organized group, and intimately related to daily living." 406 U. S. at 216, 32 L. Ed. 2d at 25. The Court in *Yoder,* 406 U. S. at 218, 32 L. Ed. 2d at 26, went on to observe that:

> ". . . secondary schooling, by exposing Amish children to wordly influences in terms of attitudes, goals, and values contrary to beliefs, and by substantially interfering with the religious development of the Amish child and his integration into the way of life of the Amish faith community at the crucial adolescent stage of development, contravenes the basic religious tenets and practice of the Amish faith, both as to the parent and the child."

In particular, the United States Supreme Court outlined the scope of its decision as follows:

> "It cannot be overemphasized that we are not dealing with a way of life and mode of education by a group claiming to have recently discovered some 'progressive' or more enlightened process for rearing children for modern life.
>
> "Aided by a history of three centuries as an identifiable religious sect and a long history as a successful and self-sufficient segment of American society, the Amish in this case have convincingly demonstrated the sincerity of their religious beliefs, the inter-relationship of belief with their mode of life, the vital role that belief and daily conduct play in the continued survival of Old Order Amish communities and their religious organization, and the hazards presented by the State's enforcement of a statute generally valid as to others. Beyond this, they have carried the even

more difficult burden of demonstrating the adequacy of their alternative mode of continuing informal vocational education in terms of precisely those overall interests that the State advances in support of its program of compulsory high school education. In light of this convincing showing, one that probably few other religious groups or sects could make, and weighing the minimal difference between what the State would require and what the Amish already accept, it was incumbent on the State to show with more particularity how its admittedly strong interest in compulsory education would be adversely affected by granting an exemption to the Amish. Sherbert v. Verner, supra.

"Nothing we hold is intended to undermine the general applicability of the State's compulsory school-attendance statutes or to limit the power of the State to promulgate reasonable standards that, while not impairing the free exercise of religion, provide for continuing agricultural vocational education under parental and church guidance by the Old Order Amish or others similarly situated." *Wisconsin v. Yoder,* 406 U. S. at 235-236, 32 L. Ed. 2d at 36-37.

The *Yoder* case represented a conflict between the exercise of religion and a state regulation which threatened the very survival of the Amish faith. A careful reading of *Yoder* establishes that the quality and degree of the Amish beliefs and the burden on those beliefs were, on a symbolic scale of constitutionality, given great weight.

In *State v. Shaver, supra,* the Bible Baptist Church objected to securing state approval of their school as required by state law. However, no attempt was made at trial to demonstrate how compliance with the minimum requirements for state approval set forth in NDCC § 15-34.1-03(1) would affect the religion of the parents or their children. In particular, the record did not disclose a deeply

rooted religious conviction against the use of certified teachers in the Bible Baptist School, and the record demonstrated that instruction could be conducted by a certified teacher without violating the basic tenets of the Bible Baptist Church.

Our discussion of the burden on the free exercise of religion in *State v. Shaver, supra* at 895, concluded with the following:

> "It appears that while the principles, beliefs, and doctrines held in common by members of the Bible Baptist Church oppose the essential requisite that the Bible Baptist School obtain state approval in order to comply with the compulsory school attendance law, the tenets of their religion do not forbid compliance with any of the specific requirements needed to obtain that approval.
>
> "Pursuant to Section 15-34.1-03, N.D.C.C., a parochial or private school must be approved by the County Superintendent of Schools and the Superintendent of Public Instruction. As the parents have failed to show that the tenets of their religion forbid compliance with the *specific* requirements needed to obtain state approval, it is difficult for us to understand their objection to seeking approval. Nevertheless, the parents contend that requiring the Bible Baptist School to seek state approval violates the tenets of their religion and imposes an impermissible and substantial burden on the free exercise thereof. For the sake of argument, we assume that this requirement is a burden upon the free exercise of their religion." [Emphasis in original.]

In the instant case, the defendants contended that requiring the Living Word Academy to seek state approval and teachers' certification unduly infringed their right to free exercise of religion. The defendants were primarily concerned with the relationship and control by the state

over education which, according to their belief, was a religious function.

To obtain state approval of a private or parochial school in North Dakota, the following minimum requirements set forth in NDCC § 15-34.1-03(1) must be met: (1) the teachers are legally certified in North Dakota in accordance with NDCC § 15-41-25 and Ch. 15-36; (2) the subjects offered are in accordance with NDCC §§ 15-38-07, 15-41-06, and 15-41-24; and (3) the school is in compliance with all municipal and state health, fire, and safety laws.

The record reflects that at least one of the teachers employed at Living Word Academy was, or had been, certified in Oklahoma. The record also reflects that the teachers employed at Living Word Academy were "certifiable" in North Dakota. The testimony of Rev. David Keister reflects that Living Word Academy would not necessarily forbid certified teachers, but a certified teacher would have to disavow certification to teach at Living Word Academy. Rev. Keister testified that the qualifications to teach at Living Word Academy included satisfying spiritual qualifications through an interviewing procedure and also satisfying competency qualifications.

The record further reflects that although the law dictates the curriculum that schools must offer, the law does not dictate, nor does the state regulate, the perspective from which the subjects must be taught. Rather, the manner in which the teachers teach their students is defined and controlled by the local school board or the lay controlling board.

In the instant case, the defendants have demonstrated that the tenets of their religion forbid compliance with a

specific requirement needed to secure state approval, *i.e.*, teacher certification. Thus, this case presents a different issue than that presented in *State v. Shaver, supra.* Although we have high respect and regard for the defendants' religious beliefs, we do not believe the burden on those beliefs are of the magnitude demonstrated in *Wisconsin v. Yoder, supra.* Nevertheless, the defendants have demonstrated that the state laws and regulations, to a degree, impose a burden upon their religious beliefs. Consequently, we must consider and analyze the state's interest in the compulsory school attendance law.

This analysis, as framed in *State v. Shaver, supra* at 891, is "whether or not the state had a compelling interest in the regulation which justified the burden on the free exercise of religion and overrode the interest of the . . . parents in exercising their religious practices." Whenever legitimate legislative objectives are expressed in a statute which imposes a substantial burden on an interest protected by the First Amendment, the legislature must achieve its goal by means which have the least restrictive or "less drastic" impact on the First Amendment freedoms. *In re Primus,* 436 U. S. 412, 98 S. Ct. 1893, 56 L. Ed. 2d 417 (1978); *Buckley v. Valeo,* 424 U. S. 1, 96 S. Ct. 612, 46 L. Ed. 2d 659 (1976); *United States v. Robel,* 389 U. S. 258, 88 S. Ct. 419, 19 L. Ed. 2d 508 (1967); *NAACP v. Button,* 371 U. S. 415, 83 S. Ct. 328, 9 L. Ed. 2d 405 (1963); *Shelton v. Tucker,* 364 U. S. 479, 5 L. Ed. 2d 231, 81 S. Ct. 247 (1960); *State v. Shaver, supra.*

There can be no doubt as to the importance of education for our youth. See, *e.g., Brown v. Board of Education,* 347 U. S. 483, 74 S. Ct. 686, 98 L. Ed 873 (1954). Neither can there be any doubt, and the defendants concede, that

the state has an interest in educating its youth. *Wisconsin v. Yoder, supra; Pierce v. Society of the Sisters of the Holy Names of Jesus and Mary,* 268 U. S. 510, 45 S. Ct. 571, 69 L. Ed. 1070 (1925); *Meyer v. Nebraska,* 262 U. S. 390, 43 S. Ct. 625, 67 L. Ed. 1042 (1923).

Article VIII of the North Dakota Constitution deals with education and contains a constitutional mandate to provide a system of schools and education within the state.[6]

Article VIII, § 1 of the North Dakota Constitution recognizes that "a high degree of intelligence, patriotism, integrity and morality on the part of every voter in a government by the people" is necessary "in order to insure the continuance of that government and the prosperity and happiness of the people."

Article VIII, § 2 of the North Dakota Constitution imposes a mandate upon the legislature to provide a uniform system of free public schools throughout the state, beginning with primary schools and extending through all grades.

Article VIII, § 3 of the North Dakota Constitution provides that instruction shall be given, as far as practicable, in those branches of knowledge that tend to impress upon the mind the vital importance of truthfulness, temperance, purity, public spirit and respect for honest labor of every kind.

Article VIII, § 4 provides that the legislative assembly shall take such other steps as may be necessary to prevent illiteracy, secure a reasonable degree of uniformity in course of study, and to promote industrial, scientific, and agricultural improvements.

These constitutional provisions all disclose that the state has a compelling interest in requiring minimum standards of education to insure adequate education of the children of the state to enable them to be viable citizens in the community.[7] Nevertheless, the state's interest is not free from a balancing process when it impinges on fundamental rights and interests such as the free exercise clause of the First Amendment. *Wisconsin v. Yoder, supra; State v. Shaver, supra.*

The North Dakota constitutional provisions relating to education have at least equal standing with Article I, § 3 and § 4 of the North Dakota Constitution guaranteeing freedom of religion and freedom of speech and press. We take note that when this constitutional provision was adopted by the state of North Dakota upon being granted statehood, it was tacitly approved and is in harmony with the First Amendment to the United States Constitution. We also take note that this was accomplished after the decision in *Reynolds v. United States,* 98 U.S. 145, 25 L.Ed. 244 (1879)[8] was handed down. We also observe that the constitutional guarantees of religious freedom rank equal with the constitutional provisions relating to free speech and press.

This illustrates that the interest of the state and the interests of individuals regarding their religious beliefs or convictions must be harmonized and balanced with the interests of the state so as to preserve the separate interests as much as possible without infringing upon the respective rights more than is necessary. The interests of neither one is absolute. We believe the stated constitutional mandate and objective establishes the compelling state interest and outbalances the resulting strain or im-

position on the defendants' religious beliefs. Under the posture of this case we have available to us no other viable alternatives.

Nevertheless, the defendants strenuously contended that the state's recognized interest in educating its youth can be achieved through a less restrictive and more precise alternative, *i.e.*, nationally standardized achievement tests.[9] The defendants contended that the Living Word Academy provides a "Christian education that is academically equal, if not superior to the education afforded in North Dakota's public schools," and that the results on the achievement tests demonstrated that the students' education at the Living Word Academy was above the national average. The defendants also contended that the use of nationally standardized achievement tests is not an infringement upon their religious beliefs.

We recognize that neither certified teachers nor standardized testing are perfect means to insure the end sought to be attained. Neither one is an exact science, but is concerned with probabilities. Each method which purports to measure learning can be questioned as to its validity.

Standardized testing ordinarily does not result in the discovery of a deficiency in education until after the term, semester, or the school year is over, which would, in effect, result in a child wasting its period of time if the results of the standardized test indicated that the child's education was deficient. We do not believe such a result would satisfy the state's interest in educating its youth.

Although we are cognizant that teacher certification may also have its deficiencies, we believe that teacher certification is an acceptable method of satisfying part of

the constitutional mandate to the legislature to properly provide an education for its youth.

The defendants state in their brief that certification of teachers and state approval "would require the school [the Academy] to subject itself to the approval of an educational system that is based and inundated with the anti-religious philosophy of secular humanism. Furthermore, the Academy would be required to hire teachers who had been given the stamp of approval by that same system." However, the defendants do not specifically object to the minimum units of study required and set out in NDCC § 15-41-24 to meet state approval and other basic requirements pertaining to health and safety. We, therefore, assume that the defendants primarily object to the teacher certification requirement which is necessary under present law in order for the Academy to qualify for and receive state approval. This invites a careful examination of what precisely or implicitly is required for certification under the state law.

The Superintendent of Public Instruction of the State of North Dakota, in consultation with the Teachers Professional Practices Commission determines the criteria[10] for teachers' certification. These standards must include consideration of character, adequate educational preparation, and general fitness to teach. NDCC § 15-36-01. We have serious reservations that anyone truly concerned with educating children would object to the teacher having the above listed qualifications or would not want the teacher to have them. None of the criteria or standards signify, even remotely or otherwise, of being "based and inundated with the anti-religious philosophy of secular humanism"

nor does the record contain any evidence suggesting to the contrary.

The criteria for certification must be based upon the above listed statutory qualifications. Furthermore, a public hearing is required before the Superintendent may issue rules and regulations concerning the issuance of a teacher's certificate. We also have serious reservations that the North Dakota public will endorse, promote, or recommend any rule or regulation which would encompass any "anti-religious philosophy of secular humanism."

Private or parochial schools are not constrained by the same manner as are public schools and may have religious activity, training, or teaching conducted as part of the curriculum in addition to the subjects required to be taught by law.

In any event, the lay controlling board (comparable to the public school board yet not limited or governed by laws applicable to public schools) has the authority to insist, as a condition of employment, that the certified teacher use methods and standards of teaching which will further their religious beliefs and convictions or be compatible with them. The statutory provisions governing the relationship between school boards and teachers regarding contracts do not apply to private or parochial schools. See *Schauer v. Jamestown College,* 323 N.W. 2d 114 (N.D. 1982). The lay controlling board is in a position to take any valid precautionary measures to insure that the teaching will be compatible with the religious beliefs and convictions. This is, or would be, a matter between the certified teacher and the board.

Neither party has brought to our attention any constitutional, statutory, or regulatory provision or policy

prohibiting the lay control board from requiring the certified teacher in a private or parochial school to include the teaching of religious subjects, or to teach in a manner compatible with their beliefs. Neither have we found any. The lay board could monitor the classroom to insure that the teaching conform with their agreed understanding or contract and take whatever legal action is necessary if the need arises.

The record contains no evidence that any certified teacher, after having been approached or requested to teach in the manner and style philosophically satisfactory and compatible with the religious beliefs, including the conscience of the defendants and others similarly situated, declined to do so or expressed any thought that the certification interfered with or prohibited such conduct.

The current statutes, and especially the state certification provisions, including the required oath[11] of the teacher do not prevent or discourage any approach or effort in that direction.

The grounds for revocation of a teacher's certificate are contained in NDCC § 15-36-15, and upon examination we find that they appear to be compatible with the stated goals of the defendants' expressed religious beliefs and convictions.

The purpose or effect of the state statutes and regulations on certification of teachers is to promote and further the education of the children. The purpose is not to impede the observance of one or all religions or to discriminate invidiously between religions, which is prohibited by *Braunfeld v. Brown,* 366 U.S. 599, 81 S.Ct. 1144, 6 L.Ed. 2d 563 (1961).

In determining whether or not certain laws or regulations create an unreasonable or undue burden upon an individual's religious freedom as guaranteed by the Constitution, even though we recognize, respect and have high regard for an individual's religious beliefs and convictions, we nevertheless, out of necessity, must apply an objective test to the facts established.

After a careful review of the constitutional guarantees and the case law on the subject, we conclude that under the present laws the state does not unreasonably interfere with the liberty of parents in the upbringing and education of their children and that the present laws do not unduly impinge on the constitutional rights of the defendants. In reaching this conclusion, we confined ourselves only to the material and specific challenges submitted because we believe that the courts, unlike in apportionment matters, are in a relatively poor position or ill-equipped to fashion a remedy which neither party has advocated. Such innovative remedies generally should be sought through the legislative process. We are primarily concerned whether or not the present law involved is valid. We conclude it is. If a better solution is available which will have an even lesser effect on the religious beliefs than the present law under consideration, it should be through the legislative process. We are not implying or intimating that the legislature may not work out a system that will be satisfactory to both sides—meaning the state and the defendants—and still accomplish the constitutional mandate.

As we stated in *State v. Shaver, supra* at 900, "In time, other means of assuring quality of education under

circumstances which provide safety and health may evolve, but until such time, this means appears to us to be proper."

Accordingly, we affirm the judgment of conviction.

/s/ J. Sands
/s/ J. Paulson
/s/ J. VandWalle
/s/ C. J. Ericstadt

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[1]North Dakota Century Code § 15-34.1-01 provides as follows:

"Every parent, guardian, or other person who resides within any school district, or who resides upon any government base or installation without any school district, and has control over any educable child of an age of seven years to sixteen years who does not fall under the provisions of sections 15-34.1-02-04 or 15-34.1-03, shall send or take such child to a public school each year during the entire time such school is in session."

North Dakota Century Code § 15-34.1-05 provides as follows:

"Any person failing to comply with the requirements of this chapter is guilty of an infraction."

[2]North Dakota Century Code § 15-34.1-03(1) provides as follows:

"The parent, guardian, or other person having control of a child required to attend school by the provisions of this chapter shall be excused by the school board from causing the child to attend school whenever it shall be shown to the satisfaction of the board, subject to appeal as provided by law, that one of the following reasons exists:

1. That the child is in attendance for the same length of time at a parochial or private school approved by the county superintendent of schools and the superintendent of public instruction. No such school shall be approved unless the teachers therein are legally certificated in the state of North Dakota in accordance with section 15-41-25

and chapter 15-36, the subjects offered are in accordance with sections 15-38-07, 15-41-06, and 15-41-24, and such school is in compliance with all municipal and state health, fire, and safety laws."

[3]This is substantially the testimony of the defendants even though the attorney questioning the defendants used the expression, "Do you *feel*," which was criticized in a special concurring opinion in *State v. Shaver*, 294 N. W. 2d 883 (N. D. 1980), as not constituting a genuine basis for challenging the constitutionality of a law on religious grounds. The New Hampshire Supreme Court, in *State v. Drew*, 89 N. H. 54, 192 A. 629, 631-632, a case involving a compulsory vaccination and attendance law, stated that:

"The defendant's individual ideas whether 'conscientious,' 'religious' or 'scientific,' do not appear to be more than opinions. They are not shown to involve any question of religious liberty. Since they are mere opinions they are irrelevant and immaterial. The defendant's views cannot affect the validity of the statute or entitle him to be excepted from its provisions."

[4]The First Amendment to the United States Constitution provides:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech or of the press; or the right of the people peaceably to assemble and to petition the government for a redress of grievances."

The North Dakota Constitution, Article I, § 3, provides:

"The free exercise and enjoyment of religious profession and worship, without discrimination or preference shall be forever quaranteed in this state, and no person shall be rendered incompetent to be a witness or juror on account of his opinion on matters of religious belief; but the liberty of conscience hereby secured shall not be so construed as to excuse acts of licentiousness, or justify practices inconsistent with the peace or safety of this state."

[5]In *Wisconsin v. Yoder, supra*, and *State v. Shaver, supra*, the state conceded or stipulated that the religious beliefs were sincerely held.

[6]Article VIII, §§ 1, 2, 3, and 4 of the North Dakota Constitution provide in their entirety as follows:

"Section 1. A high degree of intelligence, patriotism, integrity and morality on the part of every voter in a gov-

ernment by the people being necessary in order to insure the continuance of that government and the prosperity and happiness of the people, the legislative assembly shall make provision for the establishment and maintenance of a system of public schools which shall be open to all children of the state of North Dakota and free from sectarian control. This legislative requirement shall be irrevocable without the consent of the United States and the people of North Dakota.

"Section 2. The legislative assembly shall provide for a uniform system of free public schools throughout the state, beginning with the primary and extending through all grades up to and including schools of higher education, except that the legislative assembly may authorize tuition, fees and service charges to assist in the financing of public schools of higher education.

"Section 3. In all schools instruction shall be given as far as practicable in those branches of knowledge that tend to impress upon the mind the vital importance of truthfulness, temperance, purity, public spirit, and respect for honest labor of every kind.

"Section 4. The legislative assembly shall take such other steps as may be necessary to prevent illiteracy, secure a reasonable degree of uniformity in course of study, and to promote industrial, scientific, and agricultural improvements."

[7]In *State ex rel. Nagle* v. *Olin*, 64 Ohio St. 2d 341, 415 N. E. 2d 279 (1980), the Court held that the minimum standards of Ohio's compulsory education law went further than necessary to assure the state's interest in education of its children. Significantly, the *Nagle* court, *supra* at 288, stated:

"Additionally the state board might refer to the North Dakota regulatory scheme approved in *State* v. *Shaver*, *supra*. That scheme required the issuance of state approval of a private or parochial school upon a showing that (1) all teachers are legally certified, (2) courses are offered in a prescribed range of secular subjects, and (3) the school is in compliance with all municipal and state health, fire, and safety laws."

Thus, while the North Dakota regulatory scheme was not directly involved, it nevertheless received the approval of a court which had, in two instances, decided against the state regulatory scheme in Ohio.

[8]*Reynolds* v. *United States*, *supra*, involved the Mormon practice of polygamy. The United States Supreme Court held

that a party's religious belief cannot be accepted as justification for committing an overt act made criminal by the law of the land.

[9]The 1981 Legislature considered H. B. 1608 which, in substance, would have permitted standardized tests as an alternative to teacher certification.

[10]We have taken judicial notice of the material found in Guidelines & Regulations for North Dakota Educator's Professional Certificate as revised 1 August 1981, and criteria used in issuing teachers certificates.

[11]Each teacher seeking certification must subscribe to an oath or affirmation to support the Constitution of the United States and the state of North Dakota and faithfully discharge the duties of a teacher according to the best of his ability. Such an oath does not prevent any certified teacher from teaching in a style or manner in conformity and compatible with the defendants' beliefs and convictions, nor does this oath prevent the teacher from teaching subjects other than the ones specified by the state.

Criminal No. 862

State v. Rivinius

PEDERSON, Justice, concurring specially.

Often in the law business, where tradition and precedent are significant, situations must be confronted which are especially frustrating. This case illustrates some of the things that are frustrating for me. In that respect it is analogous to cases in which we are obligated to apply the exclusionary rule and thus prevent the truth from being shown in order to accomplish a collateral purpose. See debate on exclusionary rule by Kamisar, Wilkey, Canon and Schlesinger in 62 Judicature at pages 66, 214, 337, 351, 398, 404 (1978).

Even though a statute may be invalid, precedent prevents us from acknowledging it when those urging the in-

validity do not have "standing" or, something very similar, they have been unable to show that the invalidity prejudiced them. In *Hjelle v. Sornsin Construction Company*, 173 N.W. 2d 431 (N.D. 1970), at syllabus 1, this court held:

> "The general rule is that a litigant may assert only his own constitutional rights or immunities. As the Highway Commissioner has presented no weighty countervailing policies to cause an exception to that rule, it is held that he has no standing to assert the constitutional rights of adverse parties."

What gives the Amish standing, in *Wisconsin v. Yoder*, 406 U.S. 205, 92 S.Ct. 1526, 32 L.Ed. 2d 15 (1972), which Kathy Rivinius and Ronald Weikum do not have? Apparently it is the depth, quality and sincerity of their belief. I do not know who is qualified to make this evaluation—but, under our rules, the trial judge who heard and saw them testify must make it in the first instance, and there is a presumption that he made the evaluation correctly. The fact that Kathy's and Ronald's convictions were not described in the same terms—apparently as was the Amish conviction—militates against them when they ask that this court reverse the conclusions reached by the trial court.

The State has argued that Kathy's and Ronald's beliefs are short-standing. The Amish traditions demonstrated sincerely because, in part, they had been practiced for three centuries. Kathy and Ronald did not argue that their tradition (Christianity) has been practiced for over nineteen centuries.

The State further argued that inconsistencies detracted from the sincerity of Kathy's and Ronald's beliefs. Ap-

parently, when the case was being presented to the trial court, there was no effort made to show that, when judged under worldly standards, there are few Christian principles which cannot be made to appear wholly inconsistent.

If I had been the trial judge in this case, my powers of discernment would have led me to distinguish between Kathy's and Ronald's sincerity and that of the "Boo Hoos" of the "Neo-American Church" (*United States v. Kuch*, 288 F. Supp. 439 (D. D. C. 1968)), but not between Kathy's and Ronald's sincerity and that of the Amish (*Wisconsin v. Yoder*, 406 U. S. 205 (1972)). If it were appropriately raised, I would not hesitate to rule that the requirements of Article VIII, § 3, of the North Dakota Constitution relating to teaching "truthfulness, temperance, purity, public spirit, and respect for honest labor of every kind," are not being met by public schools. But I must stay with the rules that limit my authority as an appellate judge. Because we cannot substitute our judgment for that of the trial court, I concur in the majority opinion authored by Justice Sand.

/s/ J. Pederson

APPENDIX B

STATE OF NORTH DAKOTA
COUNTY OF GRANT

IN DISTRICT COURT
SOUTH CENTRAL
JUDICIAL DISTRICT

Criminal No. 582

The State of North Dakota,

Plaintiff,

vs.

Kathy Rivinius and Ronald Weikum,

Defendants.

MEMORANDUM DECISION ON APPEAL

Having been convicted of violation of 15-34.1-01 NDCC, Defendants have appealed to District Court under 33-12-34 and Rule 37 N.D.R.Cr.P. The appeal is taken from the final judgment and is a trial anew. Rule 37(g) N.D.R.Cr.P. The appeal is taken from the final judgment and is a trial anew. Rule 37(g) N.D.R.Cr.P.

The evidence presents no serious dispute relative to the essential elements of the offense. Thus the evidence establishes violation of 15-34.1-01 by evidence beyond a reasonable doubt. 12.1-01-03(1). However, Defendants do challenge the constitutionality of 15-34.1-01 claiming that as applied to them it violates their right to the free exercise of religion contrary to the First Amendment of the U. S. Constitution.

This case is very similar to *State v. Shaver,* 294 N. W. 2d 883, both on the facts and the law. In *Shaver,* our Supreme Court analyzed and followed *Wisconsin v. Yoder,* 406 U. S. 205, 92 S. Ct. 1526, 32 L. Ed. 2d 15, which re-

quires a three-pronged inquiry to determine if our law is unconstitutional as applied to the Defendants.

The three-pronged determination set out in *Shaver* is:

(1) Whether the activity interfered with by the State is motivated by and rooted in a legitimate and sincerely held religious belief;

(2) Whether the free exercise of religion has been burdened by the regulation and the extent or impact of that regulation on Defendants' religious practices; and

(3) Whether or not the State has a compelling interest in the regulation which justifies the burden on the free exercise of religion and overrides the interest of the Defendants in exercising their religious practices.

As in *Shaver,* the point of controversy in this case deals with the certification of teachers required by 15-34.1-03(1) and 15-41-25. In essence, Defendants contend that they, as parents, are bound by biblical admonitions to the education of their children without interference by requirements of the State. In *Shaver* the Court indicated that it was conceded that the first prong of the inquiry was met and for sake of argument assumed the second was also met. The Court then proceeded to discuss the third prong, that being compelling state interest. As a trial judge, I am bound by this precedent.

In discussing compelling state interest, the Court said it must be determined (1) whether or not the state has a compelling interest in the compulsory school attendance law which justifies the burden imposed on the free exercise of religion; and (2) whether or not the least restrictive means to accomplish the objective have been utilized.

As to compelling interest, I quote from *Shaver*, page 899:

> In our view, although the parents here have shown that their interest in educating their children in a non-public school is religiously oriented and is therefore an interest protected by the First Amendment, and for the sake of argument only we have assumed that the state laws impose a burden on that interest, they have not shown how the legitimate and compelling interest of the state in educating its people has been unreasonably pursued.

As to the least restrictive means, I again quote from Shaver, page 897:

> Nevertheless, the parents assert that the state's recognized interest in providing an education for its youth can be achieved through a less restrictive and more precise alternative, namely, a standardized achievement testing program. A close examination of the record reveals that, after careful study, the Department of Public Instruction saw fit not to implement a standardized achievement testing program nor has the Legislature deemed it an appropriate means to monitor the work of private and parochial schools. The record further discloses that the validity of such tests are, at best, questionable. In light of the record, this court is ill-equipped to determine whether or not standardized achievement tests would provide the state with any assurance that children in attendance at the Bible Baptist School are receiving a good education.

Finally at page 900 the Court states:

> In time, other means of assuring quality education under circumstances which provide safety and health may evolve, but until such time, this means appears to us to be proper.

This is direct authority requiring this Court to conclude that the State of North Dakota has a compelling in-

terest in the school attendance law Defendants are charged with having violated, justifying the burden imposed on the free exercise of religion, and that the means employed are the least restrictive. I would tend to agree with Justice VandeWalle's concurring opinion indicating teacher certification is less restrictive to the free exercise of religion than would be compulsory testing of students.

I am aware that Defendants have in their brief claimed that the State did not meet its burden to show compelling interest and least restrictive means. In view of the *Shaver* holdings, all of which are legal conclusions, the State need not put in any further evidence. *Shaver* rulings are based on the same statutes Defendants are prosecuted under. Apparently the Ohio Supreme Court in *State v. Olin*, 415 N. E. 2d 279, found the school attendance law of that state to be overly restrictive and referred their state board to the North Dakota regulatory scheme, which seems to be a suggestion that our law meets the least restrictive test.

Since the state statutes pass constitutional muster, it is not necessary for me to consider the first two inquiries relative to religious belief and a burden on free exercise. Even if defendants have proved these, the result would not change. Normally a court would be obligated to make these determinations in order to assure itself of Defendants' standing to raise a constitutional issue but with direct precedent on the third issue it would serve no purpose to inquire further.

The Court finds Defendants guilty as charged and imposes punishment identical to that imposed in justice court. The Defendants do not intend to be lawbreakers and this case is only a means of asserting their constitutional rights.

The attorney for the State shall prepare for my signature a judgment in conformity with this decision.

Dated this 14th day of May, 1982, at Mandan, North Dakota.

BY THE COURT:

/s/ William F. Hodny
District Judge

APPENDIX C

STATE OF NORTH DAKOTA
COUNTY OF SIOUX

IN THE COUNTY
JUSTICE COURT OF
SIOUX COUNTY

Judge: Hon. William Severin

State of North Dakota,

Plaintiff,

vs.

Kathy Rivinius, Dorothea Case,
Ronald Weikum and Gary Meyer,

Defendants.

MEMORANDUM OPINION

The defendants have been charged with violating Section 15-34.1-01 NDCC for failing to send their children to a public school in the absence of falling within an exception to the compulsory attendance statute. The facts of the case do not appear to be in dispute and, in fact, were stipulated to by counsel at the time of trial on September 9, 1981.

Based upon the undisputed and stipulated facts, the state has established a prima facie violation of NDCC 15-34.1-01 of the three defendants involved. In response to the state's showing, the defendants assert that the North Dakota compulsory school attendance law, as applied to them, is a constitutionally impermissive burden on their free exercise of religion, contrary to the First Amendment to the United States Constitution. Although the Court is sympathetic to defendants' well-presented case, it finds the defendants guilty, for the reasons stated below.

It is not necessary to set forth any discussion involving the presumption of constitutionality of these statutes,

the burden of proof on both sides, the definition of compelling state interest, or other common, preliminary matters as counsel is sufficiently learned and fluent in these areas. It is necessary, however, to state that this Court has read each brief twice and reviewed the exhibits introduced at trial, as well as read the partial transcript of the Mott trial before making this decision. The decision was difficult. It is based upon an application of the facts presented to the law as this Court perceives that law in North Dakota; specifically as interpreted by the North Dakota Supreme Court in *State v. Shaver* in light of *Wisconsin v. Yoder*.

Following the three pronged analysis in Yoder:

NATURE OF THE BELIEF

With the exception of Defendant Meyer, and although different churches are involved at the Living Word Academy, the defendants have satisfactorily conveyed that their religious beliefs command them to teach according to the Bible. Dr. Rushdoony, in the Stipulated Transcript, testified that different churches have the same basic doctrine requiring them to teach in the same manner. Defendant Meyer, however, in his September 8, 1980 letter, State Exhibit 1, indicates that it is not his religious belief that is dictating his actions in this matter. Since the remaining two defendants, Weikum and Rivinius, have satisfied this first test, we must progress to the second prong.

DEMONSTRATION OF UNDUE BURDEN

The central complaint of the defendants with the state law involves teacher certification. According to Dr. Rushdoony, compliance with state health, fire and safety laws

is not in the same category as compliance with certification of teachers since the health and safety is a concern legitimately belonging to the state (Caesar), while education of the children belongs to the parents (church).

Defendant Weikum was the only defendant to testify at trial. His concern was that a certified teacher, in the process of becoming certified, would follow required courses and learn teaching techniques from a state as opposed to a religious perspective. That such learning would taint the teacher preventing him from teaching according to Living Word Academy Doctrines. It is unclear whether Mr. Weikum believes that all certified teachers are tainted beyond reform or whether one could disavow his learning methods and be acceptable to Living Word Academy.

Reverend Kiester testified that:

> ". . . we will not necessarily forbid certification of our teachers. The explanation for that is that we don't consider that certification per se disqualifies one for teaching for us. It raises certain suspicion that must come out in the questioning of the teaching candidate. The particular problem would come if we know of the certification and she desires to become certified for the express purpose to teach in our school." (Stipulated Transcript, p. 243.)

And further, at p. 281 of the Stipulated Transcript, Reverend Kiester indicates that it would be possible for a state teacher graduate to teach at Living Word Academy. Dr. Rushdoony, in the Stipulated Transcript, also indicates that a teacher, depending on which one, could graduate from the state school and still teach in the Christian school. Based upon this record, although it may be difficult to locate a satisfactory certified teacher for Living Word Acad-

emy, such a task is not an undue burden. According to Ronald Stastnay, North Dakota does not dictate the certified teacher's teaching methods or perspectives. The teacher would be free to instruct from a religious basis, and in accordane with the Living Word Academy requirements.

COMPELLING STATE INTEREST

Since the first two prongs have resolved the issues, it is not necessary to address the compelling state interest question.

This Court fines each defendant the sum of $10.00 and assesses costs against each defendant in the amount of $20.00, these to be paid within thirty (30) days of this decision.

Defendants have been found guilty by this Court. They have a right to appeal this decision and receive a new trial. Counsel for defendants can advise them how to perfect this right.

Dated this 21st day of October, 1981.

/s/ William Severin
County Justice

APPENDIX D

NORTH DAKOTA CENTURY CODE

15-36-01. Teacher's certificates—Criteria to be established. —The superintendent of public instruction, after consulting with the teachers' professional practices commission, shall determine the criteria for teacher certification for school terms beginning on or after July 1, 1974. The established criteria shall be based upon standards which shall include considerations of character, adequate educational preparation, and general fitness to teach in the public schools of this state. After holding a public hearing thereon, the superintendent shall issue rules and regulations concerning the issuance of teachers' certificates and such certificates shall be issued by his office in accordance with such rules and regulations. Nothing in this section shall be interpreted to affect the validity of life certificates in existence on the effective date of this section, nor shall this section affect vocational education certificate qualifications as provided in chapter 15-20.1.

15-36-02. Second grade elementary certificate. — Repealed.

15-36-03. First grade elementary certificate issued without examination — Permits. — Repealed.

15-36-04. Second grade professional certificate — Diploma from state schools and from schools outside of state. — Repealed.

15-36-05. First grade professional certificate — Diploma from university or state university or equivalent institutions of other states. — Repealed.

15-36-06. Special certificates. — Repealed.

15-36-07. Citizenship requirement before certification. —A teacher's certificate shall not be issued to any person who is not a citizen of the United States of America or who has not declared his intention to become a citizen of the United States. Except for the provisions of section 15-36-11, no person who is not a citizen or has not declared his intention to become a citizen shall be eligible to enter into a contract to teach in any public school in this state.

15-36-08. Fees for certificates. —The superintendent of public instruction shall require a fee of five dollars for each certificate issued by this state, and no certificate shall be issued for a period of less than one school year. The fees herein provided for shall be deposited in the state treasury to the credit of the general fund of the state.

15-36-09. Disposition of fees collected for teachers' certificates. —Repealed.

15-36-10. Teachers' certificates valid in county only when recorded — Validity of certificates previously issued. —Any certificate issued by the superintendent of public instruction shall authorize the holder to teach in any county of the state when it is recorded in the office of the county superintendent of schools of such county. The county superintendent shall record certificates presented to him. Nothing contained in this chapter shall affect the validity of any certificate lawfully issued prior to September 1, 1931.

15-36-11. Certificate required. —No person who is not the holder of a valid teacher's certificate shall be per-

mitted or employed to teach in any of the public schools of the state, except that teachers unable to be certificated because they are not citizens of the United States or because they have not declared their intention to become citizens of the United States, but are otherwise qualified to teach in North Dakota, may be employed on a temporary basis if they are approved annually by the superintendent of public instruction. The employment of such teachers in accordance with this section shall not cause any foundation aid payments to be withheld from the school districts by whom they are employed.

15-36-12. Certificate must be exhibited to clerk—Completion of term after expiration of certificate. —No teacher shall be entitled to receive any compensation for the time he teaches in a public school without a certificate to teach which lawfully is issued and in force in the county in which the school is taught. Prior to receiving his salary for the first month taught in a school district, a teacher must exhibit his certificate to the clerk of the school board. If a teacher's certificate shall expire by its own limitations within six weeks of the close of the term, the teacher may finish the term without re-examination or renewal thereof.

15-36-13. Teachers' examination for elementary certificates. —Repealed.

15-36-14. Examination papers—Filing—Regrading. —Repealed.

15-36-15. Revocation of teacher's certificates—Grounds—Effect. —The superintendent of public instruction shall suspend for a period of time, or revoke and annul any teacher's certificate granted in this state upon any or all of the following grounds:

1. For any cause which would have authorized or required him to refuse to grant the certificate if the facts were known at the time when the certificate was granted;

2. For incompetency, immorality, intemperance, or cruelty of the certificate holder;

3. For the commission, by the certificate holder, of a crime as defined in the laws of this state, or of the United States;

4. For the refusal by the certificate holder to perform his duty as a teacher or for his general neglect of the work of the school;

5. For the breach, by the certificate holder, of his contract with any school district;

6. Serious violation or a series of violations of the professional codes and standards promulgated in accordance with law.

The revocation of a certificate shall terminate the employment of the holder of such certificate in the school in which he is employed when the certificate is revoked, but the teacher shall be paid to the time he received notice of the revocation. Appeals from any order of revocation may be taken to the district court of Burleigh County as provided by chapter 28-32.

15-36-16. Proceedings to revoke certificate. —The superintendent of public instruction may upon his own motion, or upon the receipt of a formal complaint by the teachers' professional practices commission alleging grounds for the revocation or suspension for a period of time of any person's teacher's certificate shall make such

preliminary investigation as he may deem necessary, and if it shall appear probable that such grounds exist, he shall proceed with proceedings in accordance with chapter 28-32. Upon the completion of such proceedings, if the superintendent of public instruction shall find that grounds for revocation or suspension for a period of time do exist, he shall issue his order in the manner provided in chapter 28-32 to revoke the teacher's certificate of such person as provided in section 15-36-15.

15-36-17. Notice to be given when teacher's certificate is revoked. — When a teacher's certificate is revoked, the superintendent of public instruction shall cause notice to be sent immediately to the clerk of the school board or the secretary of the board of education, as the case may be, of the district wherein the teacher is employed, and shall notify the teacher of the revocation through such clerk. The superintendent also shall notify each county superintendent of schools in the state and shall enter his action in the case upon the records of his office. Upon receipt of notice of revocation of his certificate, the teacher shall return the certificate to the superintendent of public instruction, and if the teacher neglects so to do, the superintendent may issue notice of the revocation by publication in the official newspaper of the county in which the teacher last was employed.

15-41-25. High schools — Teacher qualification. Not later than July 1, 1961, every teacher in any high school in this state teaching any of the course areas or fields mentioned in section 15-41-24 shall have a valid teacher's certificate and shall have a major or minor in the course areas or fields that he is teaching if such high school is to receive any approval by the department of public instruction. However, a teacher granted a certificate to teach

in the disciplines of trade, industrial, technical, and health under chapter 15-20.1 and possessing neither a major nor a minor in the field in which he is employed shall not effect the approval of the employing school district.

Office-Supreme Court, U.S.
FILED
MAR 14 1983
ALEXANDER L. STEVAS,
CLERK

82-1374

No. .....

In The

Supreme Court of the United States

October Term, 1982

KATHY RIVINIUS AND RONALD WEIKUM,
Petitioners,

vs.

STATE OF NORTH DAKOTA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NORTH DAKOTA

RESPONDENT'S BRIEF IN OPPOSITION

State of North Dakota
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QUESTIONS PRESENTED

(1) Whether the decision of the North Dakota Supreme Court violated any religious rights guaranteed to the petitioners by the First Amendment to the United States Constitution?

(2) Whether the decision of the North Dakota Supreme Court decides a federal question in a way which conflicts with the decision of another state court of last resort, a federal court of appeals, or in any way conflicts with applicable decisions of this Court?

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No. .....

In The

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October Term, 1982

KATHY RIVINIUS AND RONALD WEIKUM,
Petitioners,

vs.

STATE OF NORTH DAKOTA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NORTH DAKOTA

RESPONDENT'S BRIEF IN OPPOSITION

The Attorney General of the State of North Dakota, on behalf of the State of North Dakota, respectfully requests this Court to deny the Petition for Writ of Certiorari which seeks the review of the decision of the Supreme Court of the State of North Dakota in this case. This Brief in Opposition is submitted pursuant to Rule 22 of the United States Supreme Court.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

The following provisions of the North Dakota Constitution, the United States Constitution, and the North Dakota Century Code are involved in the questions presented:

UNITED STATES CONSTITUTION

U. S. Const. amend. I:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

NORTH DAKOTA CONSTITUTION

N. D. Const. art. I, § 3:

The free exercise and enjoyment of religious profession and worship, without discrimination or preference shall be forever guaranteed in this state, and no person shall be rendered incompetent to be a witness or juror on account of his opinion on matters of religious belief; but the liberty of conscience hereby secured shall not be so construed as to excuse acts of licentiousness, or justify practices inconsistent with the peace or safety of this state.

N. D. Const. art. VIII, §§ 1, 2, 3, and 4:

Section 1. A high degree of intelligence, patriotism, integrity and morality on the part of every voter in a government by the people being necessary in order to insure the continuance of that government and the prosperity and happiness of the people, the legislative assembly shall make provision for the establishment and maintenance of a system of public schools which shall be open to all children of the State of North Dakota and free from sectarian control. This legislative requirement shall be irrevoc-

able without the consent of the United States and the people of North Dakota.

Section 2. The legislative assembly shall provide for a uniform system of free public schools throughout the state, beginning with the primary and extending through all grades up to and including schools of higher education, except that the legislative assembly may authorize tuition, fees and service charges to assist in the financing of public schools of higher education.

Section 3. In all schools instruction shall be given as far as practicable in those branches of knowledge that tend to impress upon the mind the vital importance of truthfulness, temperance, purity, public spirit, and respect for honest labor of every kind.

Section 4. The legislative assembly shall take such other steps as may be necessary to prevent illiteracy, secure a reasonable degree of uniformity in courses of study, and to promote industrial, scientific, and agricultural improvements.

NORTH DAKOTA CENTURY CODE

N. D. Cent. Code § 15-41-24:

The following units of study shall be made available to all students in each public and private high school in this state at least once during each four-year period, and each private high school shall comply with the requirements of this section if such high school is to receive approval by the department of public instruction:

1. English, four units.
2. Mathematics, three units.
3. Science, four units.
4. Social studies, three units.
5. Health and physical education, one unit.
6. Music, one unit.

7. Any combination of the following course areas: business education, economics, and the free enterprise system, foreign language, industrial arts, vocational education, six units. For purposes of this subsection vocational education shall include home economics, agriculture, office education, distributive education, trade industrial, technical, and health occupations.

Each public or private or public high school may count for purposes of compliance with this section those vocational education courses which are offered through cooperative arrangements approved by the state board of vocational education.

N. D. Cent. Code § 15-36-01:

The superintendent of public instruction, after consulting with the teachers' professional practices commission, shall determine the criteria for teacher certification for school terms beginning on or after July 1, 1974. The established criteria shall be based upon standards which shall include considerations of character, adequate educational preparation, and general fitness to teach in the public schools of this state. After holding a public hearing thereon, the superintendent shall issue rules and regulations concerning the issuance of teachers' certificates, and such certificates shall be issued by his office in accordance with such rules and regulations. However, any teacher who has graduated from college in an accredited teacher education program on or before September 1, 1980, shall not be required to earn any college credits in native American or other multicultural courses in order to be certified or recertified. Nothing in this section shall be interpreted to affect the validity of life certificates in existence on July 1, 1973, nor shall this section affect vocational education certificate qualifications as provided in chapter 15-20.1.

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STATEMENT OF THE CASE

On October 9, 1980, petitioners Kathy Rivinius and Ronald Weikum were charged with violating Section 15-34.1-01 of the North Dakota Century Code for sending their children to Living Word Academy, a school that is not approved by the County Superintendent of Schools and the Superintendent of Public Instruction of the State of North Dakota as required by Section 15-34.1-03 (1), N. D. C. C. The action was brought in Grant County Justice Court, but was transferred to the Sioux County Justice Court after the petitioners filed an affidavit of prejudice against the Grant County Justice hearing the case.

On September 9, 1981, trial was held before the Sioux County Justice on this charge. The petitioners argued that their religious beliefs would be violated should they send their children to a school utilizing certified teachers.

> Defendant Weikum was the only Defendant to testify at trial. His concern was that a certified teacher, in the process of becoming certified, would follow required courses and learn teaching techniques from a state as opposed to a religious perspective. That such learning would taint the teachers preventing him from teaching according to Living Word Academy Doctrines. (See App. C, at App. 34, of Petitioners' Brief.)

However, the Sioux County Justice, in reviewing the entire record, found it difficult to understand the petitioners' contention that the North Dakota Compulsory School Attendance Law unduly burdened their exercise of religious beliefs.

> And further, at p. 281 of the Stipulated Transcript, Reverend Kiester indicates that it would be pos-

> sible for a state teacher graduate to teach at Living Word Academy. Dr. Rushdonny, in the Stipulated Transcript, also indicates that a teacher, depending on which one, could graduate from the state school and still teach in a Christian school. Based upon this record, although it may be difficult to locate a satisfactory certified teacher for Living Word Academy, such a task is not an undue burden. According to Ronald Stastnay, North Dakota does not dictate the certified teacher's teaching methods or prospectives. The teacher would be free to instruct from a religious basis, and in accordane (sic) with the Living Word Academy requirements. (See App. C, at App. 34-5, of Petitioners' Brief.)

As a result, the Defendants were found guilty of violating North Dakota's Compulsory School Attendance Law.

The petitioners appealed that judgment to the South Central Judicial District Court in Grant County, North Dakota. On May 14, 1982, District Court Judge William F. Hodny found the Defendants guilty for violating North Dakota's Compulsory School Attendance Law. In arriving at this conclusion, the Court stated as follows:

> This is direct authority [State v. Shaver, 294 N. W. 2d 883 (N. D. 1980)] requiring this Court to conclude that the State of North Dakota has a compelling interest in the school attendance law Defendants are charged with having violated, justifying the burden imposed on the free exercise of free religion, and that the means employed are the least restrictive. I would tend to agree with Justice VandeWalle's concurring opinion indicating teacher certification is less restrictive to the free exercise of religion than would be compulsory testing of students. (See App. B, at App. 29-30 of Petitioners' Brief.)

The petitioners appealed the judgment of the District Court to the North Dakota Supreme Court. The North

Dakota Supreme Court handled this appeal as it did in *State v. Shaver,* 294 N. W. 2d 883 (N. D. 1980) which also raised the identical issues raised by petitioners. That is to say, the Supreme Court of the State of North Dakota evaluated the claims of the petitioners as to possible constitutional violations as a result of the enforcement of North Dakota Compulsory School Attendance Law using the three-prong analysis set down by this Court in *Wisconsin v. Yoder,* 406 U. S. 205 (1972). The North Dakota Supreme Court, in the case at hand, concluded that the belief of the petitioners was a sincerely held belief, but concluded that those beliefs were not unduly burdened by enforcement of the State's Compulsory School Attendance Law. 328 N. W. 2d at 227. Furthermore, the Court concluded that the State's compelling interest in the enforcement of the Compulsory School Attendance Law justified any burden placed upon the petitioners' free exercise of religion.

> "We believe the stated constitutional mandate and objective establishes the compelling state interest and outbalances the resulting strain or imposition on the defendants' religious beliefs. Under the posture of this case we have available to us no other viable alternatives." 328 N. W. 2d at 229.

The opinion of the North Dakota Supreme Court was rendered December 17, 1982. Rule 40 of the North Dakota Rules of Appellate Procedure provides for a petition for rehearing to be filed within 14 days after entry of the judgment. Petitioners, for whatever reasons, decided against filing for a petition for rehearing before the North Dakota Supreme Court. Instead, petitioners have gone directly to the United States Supreme Court.

REASONS WHY THE WRIT SHOULD BE DENIED

A. The Decision Of The North Dakota Supreme Court Does Not Violate Any Religious Rights Guaranteed To The Petitioners By The First Amendment To The United States Constitution.

The affirmance by the North Dakota Supreme Court of the District Court's conviction of petitioners for violating the State of North Dakota's Compulsory School Attendance Law is in compliance with the First Amendment to the United States Constitution as interpreted by this Court. The decision is also in compliance with the North Dakota Constitution.

Petitioners characterize this decision as "abhorrent" because the North Dakota Supreme Court gave "high respect and regard" for the petitioners' religious beliefs. Apparently, the petitioners are of the opinion that a court of law cannot respect and give regard to those beliefs profounded by the party to a lawsuit and yet find those individuals in violation of the law. Petitioners are unable to provide legal authority for the implication contained in their brief that persons whose religious beliefs are given "high respect and regard" by a court of law cannot be found in violation of a state's compulsory school attendance law.

Although the freedom to hold religious beliefs is absolute, the freedom to act, even if the action is in accordance with religious convictions, is not totally free from legislative restrictions. See, e. g., *Sherbert v. Verner,* 374 U. S. 398 (1963) [denial of unemployment compensation benefits to Seventh-Day Adventists restricted free exercise

of religion and state's interest did not justify restriction]; *Braunfeld v. Brown,* 366 U. S. 599 (1961) [free exercise of religion not violated by Sunday closing law]; *Prince v. Commonwealth of Massachusetts,* 321 U. S. 158 (1944) [statute prohibiting children under specified age from selling newspapers, magazines, or periodicals in public street did not violate the exercise of religion]; *Reynolds v. The United States,* 98 U. S. 145 (1879) [statute prohibiting polygamy did not violate free exercise of religion]; *State v. Shaver,* 294 N. W. 2d 883 (N. D. 1980) [compulsory school attendance law did not violate free exercise of religion].

In *Wisconsin v. Yoder,* 406 U. S. 205 (1972), this Court formulated a three-prong analysis to determine whether or not Wisconsin's Compulsory School Attendance Law was unconstitutional as applied to Amish parents. The three-prong analysis in *Yoder* involved a determination of:

1. Whether or not the activity interfered with the State was motivated by and rooted in a legitimate and sincerely held religious belief;
2. Whether or not the parties' free exercise of religion had been burdened by the regulation, and the extent or impact on their religious practices; and
3. Whether or not the State had a compelling interest in the regulation in which justified the burden on the free exercise of religion. 406 U. S. at 215-34.

The State of North Dakota, the petitioners, and all of the lower courts which heard this dispute agreed that the three-prong analysis of *Yoder* must be followed in resolving this case. There was never any attempt or sug-

gestion to use a different method to determine these constitutional issues raised by the parents involving this matter.

This is not the first time the North Dakota Supreme Court has heard a challenge to North Dakota's Compulsory School Attendance Law involving the free exercise of religion. In *State v. Shaver*, 294 N. W. 2d 883 (N. D. 1980), the North Dakota Supreme Court faced the identical issues raised in this case. Indeed, counsel for the petitioners in the case at hand also represented the parents in *Shaver*.

In *Shaver*, the North Dakota Supreme Court made it quite clear that the three-prong analysis of *Yoder* would be used to resolve the constitutional challenges made by the parents.

> We will apply the constitutional analysis and approach utilized in *Yoder* to the instant case. 294 N. W. 2d at 891.

In applying the three-prong analysis of *Wisconsin v. Yoder, supra,* to *State v. Shaver, supra,* the North Dakota Supreme Court noted the observation of this Court in *Yoder* where it is stated that:

> *Pierce* [268 U. S. 510, 45 S. Ct. 571, 69 L. Ed. 1070 (1925)] of course, recognized that where nothing more than the general interest of the parent and the nurture and education of his children are involved, it is beyond dispute that the State acts "reasonably" and constitutionally in requiring education to age 16 in some public or private school meeting the standards described by the State. 406 U. S. at 233, 92 S. Ct. at 1542.

The North Dakota Supreme Court made the following conclusion based upon this observation by this Court in *Yoder*:

> For this reason, we believe that the right of parents to direct the upbringing and education of the children is subject to reasonable state regulation pursuant to the state's police powers. We have not been shown wherein the State's laws are unreasonable. 294 N. W. 2d at 899.

The outcome of *Shaver* was an affirmance of the parents' conviction for violating the State's Compulsory School Attendance Law. The North Dakota Supreme Court reviewed the record on appeal and found no attempt by the parents to show how compliance with the compulsory school attendance law would affect the religion of the parents or their children.

> A perusal of the record, however, fails to disclose a deeply-rooted religious conviction against the use of certified teachers in the Bible Baptist School. 294 N. W. 2d at 894.

The case at hand received the same analysis by the North Dakota Supreme Court as was employed in *Shaver*. The constitutional analysis in approach utilized in *Wisconsin v. Yoder, supra,* was applied to resolve the conflict between the State's interests in the education of its youth and the fundamental rights and interests protected by the free exercise clause of the First Amendment.

In applying the *Yoder* three-prong analysis to the case at hand, the North Dakota Supreme Court concluded that the parents' religious beliefs were sincerely held (prong No. 1), but concluded that the burden placed upon

the parents' religious beliefs were not of the magnitude demonstrated in *Wisconsin v. Yoder, supra* (prong No. 2).

> The record reflects that at least one of the teachers employed at Living Word Academy was, or had been, certified in Oklahoma. The record also reflects that teachers employed at Living Word Academy were "certifiable" in North Dakota. The testimony of Rev. David Keister reflects that Living Word Academy would not necessarily forbid certified teachers, but a certified teacher would have to disavow certification to teach at Living Word Academy. Rev. Keister testified that the qualifications to teach at Living Word Academy included satisfying spiritual qualifications through an interviewing procedure and also satisfying competency qualifications.
>
> The record further reflects that although the law dictates the curriculum that schools must offer, the law does not dictate, nor does the state regulate, the perspective from which the subjects must be taught. Rather, the manner in which the teachers teach their students is defined and controlled by the local school board or the lay controlling board. 328 N. W. 2d at 227.

Nevertheless, the North Dakota Supreme Court gave the petitioners the benefit of the doubt and reached the third prong of a *Yoder* analysis. The Court considered the compelling interest of the State of North Dakota in education and the method chosen by the State to carry out that compelling interest.

> There can be no doubt as to the importance of education for our youth. See, *e. g., Brown v. Board of Education,* 347 U. S. 483, 74 S. Ct. 686, 98 L. Ed. 873 (1954). Neither can there be any doubt, and the defendants concede, that the state has an interest in educating its youth. *Wisconsin v. Yoder, supra; Pierce v. Society of the Sisters of the Holy Names of Jesus and Mary,* 268 U. S. 510, 45 S. Ct. 571, 69 L. Ed.

1070 (1925); *Meyer v. Nebraska,* 262 U. S. 390, 43 S. Ct. 625, 67 L. Ed. 1042 (1923). 328 N. W. 2d at 227.

The North Dakota Supreme Court concluded that the State's compelling interests in the education of its youth was not being unreasonably pursued by way of the Compulsory School Attendance Law. More specifically, the Court concluded that although teacher certification may have its deficiencies, it is an acceptable method of satisfying a part of the constitutional mandate to the legislature to properly provide an education for the youth of the State. Furthermore, the Court pointed out that a decision to replace the teacher certification requirements should be made by the legislature rather than the courts. 328 N. W. 2d at 231.

> If a better solution is available which will have an even lesser effect on the religious beliefs than the present law under consideration, it should be through the legislative process. 320 N. W. 2d at 231.

In *Wisconsin v. Yoder, supra,* the Amish successfully showed that the impact of Wisconsin's Compulsory School Attendance Law on Amish religious practices was severe and would require the Amish parents "to perform acts undeniably at odds with sentimental tenents of their religious beliefs." 404 U. S. at 218. The degree of the burden on the religious practice is an important consideration which this Court and the North Dakota Supreme Court went to great lengths to emphasize. This Court distinctly pointed out that compulsory school attendance for the Amish beyond the eighth grade would not merely offend "important Amish religious tenents from a subjective point of view," but would pose "a very real threat of

underminding the Amish community and religious practice as they exist today." 406 U. S. at 218.

Simply put, the parents in this case have failed to make a showing of severe burden and undue infringement similar to that made in *Wisconsin v. Yoder, supra.* The record before the North Dakota Supreme Court contained inconsistent and contradictory testimony by these parents as to why they objected to the State's Compulsory School Attendance Law and how this law burdened their religious practices. The North Dakota Supreme Court noted that the parents objected to the requirement of certified teachers, and yet sent their children to Living Word Academy where a certified teacher was employed. 328 N. W. 2d at 227. It is incumbent upon these petitioners to show the coercive effect of the compulsory school attendance law upon their religious practices. *Abington School Dist. v. Schempp*, 374 U. S. 203 (1963). Based upon the record before the North Dakota Supreme Court, these petitioners simply failed to show such a coercive effect.

The petitioners insist that the North Dakota Supreme Court has done them great harm in this dispute. Yet, given the facts of the case, especially the less than convincing testimony as to any burden placed upon the parents, the North Dakota Supreme Court really had no other choice.

> We believe the stated constitutional mandates and objective establishes the compelling state interest and outbalances the resulting *strain or imposition* upon the defendants' religious beliefs. Under the posture of this case we have available to us no other viable alternatives. (Emphasis supplied.) 328 N. W. 2d at 229.

B. The Decision Of The North Dakota Supreme Court Has Not Decided A Federal Question In A Way Which Is In Conflict With The Decision Of Another State Court Of Last Resort, A Federal Court Of Appeals, Or Is In Any Way In Conflict With Applicable Decisions Of This Court.

The decision of the North Dakota Supreme Court was rendered after applying the three-prong analysis of *Wisconsin v. Yoder, supra.* Indeed, as earlier pointed out, this is the second time the North Dakota Supreme Court has had the occasion to face this issue and both times applied the analysis of *Wisconsin v. Yoder.* High courts of other states have analyzed similar disputes in exactly the same manner. See *State v. Riddle,* 285 S. E. 2d 359 (W. Va. 1981); *Douglas v. Faith Baptist Church,* 301 N. W. 2d 571 (1981), *dismissed* 454 U. S. 803 (1981).

The petitioners, in their brief, have attempted to give the appearance that the decision rendered in this case by the North Dakota Supreme Court conflicts with the decision of other state courts considering the same issue. (*See* Petitioners' Brief, p. 16.) After examining the cases cited by petitioners, however, the conflicts they attempt to create simply fail to materialize. In *Kentucky State Board, et al. v. Rudasill,* 589 S. W. 2d 877 (Ky. 1979), *cert. denied,* 446 U. S. 938 (1980), the Kentucky Supreme Court dealt with a section of the Kentucky Constitution which provided that no person may be compelled to send his child to any school to which he may be conscientiously opposed. Such a constitutional provision does not exist in the North Dakota Constitution and Respondent would submit that this case is irrelevant for the purposes of reviewing the case at hand.

In *State v. Whisner*, 351 N. W. 2d 750 (Ohio 1976), the Ohio Supreme Court dealt with a state regulation as to approved schools which could only be described as pervasive, all-encompassing, and self-contradictory. Significantly, in *State, ex rel. Nagal v. Olin*, 415 N. E. 2d 279, 288 (Ohio 1980), the Ohio Supreme Court approved of the simple North Dakota regulatory scheme as set forth in Section 15-34.1-03 (1), N. D. C. C., and recommended that scheme to the Ohio Legislature.

In *State v. LaBarge*, 357 A. 2d 121 (Vt. 1976), there wasn't even a claim as to any infringement upon the free exercise of religion as guaranteed by the constitution. Finally, in *State v. Massa*, 231 A. 2d 252 (Morris County Court 1967), we have a decision of a county court which predates *Wisconsin v. Yoder, supra*, by some five years.

Petitioners state that the decision of *Wisconsin v. Yoder, supra*, has caused confusion among the states in determining their interest in education. That just is not so. The states are more than capable in determining what their interests in education are and are not. Confusion has not been created by the decision of this Court in *Wisconsin v. Yoder, supra*. Indeed, this decision has caused uniformity in the states as all such issues are being resolved by the same three-prong analysis set down by this Court.

Instead, petitioners simply do not like the decision of the North Dakota Supreme Court in upholding the State's compelling interest in education as carried out by the teacher certification requirement. Petitioners are attempting to convince the United States Supreme Court to step in and tell the State of North Dakota, along with all other

49 states, exactly how a state may carry out its compelling interest in seeing that its youth are educated.

In the final analysis, what the petitioners are seeking is a mandate from the United States Supreme Court to the State of North Dakota, and all other states, directing that standardized tests showing that children are learning will be an irrefutable presumption that the State's compelling interest in education is being satisfied despite any state requirements for certified teachers. Petitioners have attempted to achieve this through the legislature and have failed. They have attempted to achieve this goal by defending this action through the County Justice Court, the District Court in the South Central Judicial District of the State of North Dakota, and the North Dakota Supreme Court. Petitioners have failed to achieve this goal at every attempt and are now attempting to lure the United States Supreme Court into this quagmire.

Respondents would respectfully submit that the United States Supreme Court should decline to act as a "super legislature." The states are more than qualified and capable in determining what their interests are in education and the best method to further those interests. So long as the free exercise of religion clauses of the United States and other state constitutions are not violated, as determined by application of the three-prong analysis in *Wisconsin v. Yoder, supra,* it is best to leave this matter up for determination by the individual states. The State of North Dakota has better information at its disposal necessary to determine, identify, and promote the state's compelling interests in education.

CONCLUSION

Petitioners have failed to show that the decision of the North Dakota Supreme Court violated any of their religious rights guaranteed to them by the First Amendment to the United States Constitution or by the North Dakota Constitution. Furthermore, the petitioners have failed to show that this decision is in conflict with the decisions of other state courts, of a federal court of appeals, or in any way conflicts with the applicable decisions of this Court.

For these reasons, a writ of certiorari to review the judgment and opinion of the Supreme Court of the State of North Dakota in this matter should be in all things denied.

Respectfully submitted,

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